

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re ANTONIO DE JESUS NUÑEZ

on Habeas Corpus.

G040377

(Super. Ct. No. 01ZF0021)

ORDER MODIFYING OPINION;
NO CHANGE IN JUDGMENT

On the court's own motion, it is ordered that the opinion filed herein on April 30, 2009, be modified as follows:

1. On page 34, at the end of the first new paragraph, following the sentence ending, "we must recognize that no injuries resulted from his crime," insert the following citation:

(Compare *People v. Em* (2009) 171 Cal.App.4th 964, 976

[observing "the defendant's age matters," but "[i]t is also manifestly true, however, that murder matters"; upholding against federal and state constitutional challenges two consecutive 25 years-to-life terms for a nearly 16-year-old murder defendant].)

2. On page 34, in the penultimate sentence of the second new paragraph, delete the words “on which he was never convicted” and substitute the words “that were never adjudicated,” so the sentence reads:

Similarly, petitioner’s other *arrests* for nonviolent offenses that were never adjudicated, such as possessing stolen property and drug possession, do not trigger recidivist treatment.

3. On page 36, in the first sentence of the first new paragraph, the phrase “petitioner’s evidence shows” is to be inserted between the words “where” and “he” so that the sentence reads:

Petitioner has shown on the third prong, however, that imposition of an LWOP sentence on society’s youngest offenders for a nonhomicide, no-injury offense is freakishly rare — to the point where petitioner’s evidence shows he is the only known recipient of such drastic punishment in any state in the country or anywhere in the world.

4. On page 37, at the conclusion of the sentence ending “we hold defendant’s LWOP sentence violates the Eighth Amendment,” add as footnote 9 the following footnote:

⁹ Petitioner’s evidence shows violent juvenile crime is far from rare, with, in 2001, 100 juveniles arrested for kidnapping and 12,182 arrested for assault — *in California alone*. (See California Criminal Justice Profile (2002) http://stats.doj.ca.gov/cjsc_stats/prof01/00/3C.htm [as of May 22, 2009].) And in the 10-year period between 1995 and 2004, petitioner’s evidence indicates 1343 children age 14 or under were arrested for murder or non-negligent manslaughter nationwide. (See U.S. Dept. of Justice, Uniform Crime Reports: Crime in the United States (2004) p. 290 <http://www.fbi.gov/ucr/ucr.htm> [as of May 22, 2009]; *id.* at p. 280 (2003); *id.* at p. 244 (2002); *id.* at p. 244 (2001); *id.* at p. 226 (2000); *id.* at p. 222 (1999); *id.* at p. 220 (1998); *id.* at p. 232 (1997); *id.* at p. 224 (1996); *id.* at

p. 218 (1995).) Amidst all these offenses — and incalculably more worldwide — petitioner has been singled out in a manner similar to the arbitrariness of a lightning strike: he is the only youth under age 15 sentenced to LWOP for a nonhomicide, no-injury crime.

The modifications do not change the judgment.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.